U.S. Department of Labor

Board of Alien Labor Certification Appeals
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DATE: January 7, 2002

Case No.: **2000-INA-285**
CO No.: **P1997-NY-02110101**

In the Matter of:

RUBIE'S COSTUME COMPANY, INC.
Employer

on behalf of

FELIX CARCHI
Alien

Certifying Officer: Delores DeHaan
New York, New York

Appearance: William Pryor, Esquire
New York, New York

Before: Burke, Chapman, and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM . This case arises from the employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

Statement of the Case

On April 30, 1996, Rubie's Costume Company, Inc. ("Employer") filed an *Application for Alien Employment Certification* (ETA 750A) to permit the permanent employment of Felix Carchi ("the Alien") as a Manager, Knitting Department, with the following duties:

> Coordinate with designer for different trims required for garments. Set up knitting, epilat and tisch knitting machines which require pins, needles and yarn holders. Order materials for the specific patterns needed and set up production.

(AF 15). Supervision of 30 knitting machine operators was listed as another special requirement of the position. The Employer offered a salary of $400.00 per week for a 35 hour week.

Upon receipt of the application, the agency responsible for its initial processing, the New York State Department of Labor (NYDOL), informed the Employer that its wage offer was below the prevailing wage for the position of $731.61 per week based on the B&LR Survey of Exempt Compensation, Mid-Atlantic Edition, PG. 17, NYC Area - 07/02/1996. (AF 3-5).

The Employer responded by submitting a single page from the 1996 "Apparel Plant Wages Survey" published by the American Apparel Manufacturers Association (AAMA Survey). The position of "Plant Office Manager" was circled. The 1996 salary for this position was noted to be $390, and the Employer contended in an accompanying letter that this was the correct weekly salary for a Plant Manager. (AF 6-10).

The NYDOL informed the Employer that the survey submitted by the Employer was lacking in vital information and instructed it to submit the part of the survey which indicated the definition and levels of the title and the locations that the survey covers. (AF 11). The Employer then submitted pages 3 & 4 of the AAMA Survey. The specific information requested by the NYDOL, definitions of titles and locations the survey covered, was not included in the pages submitted. (AF 17-18).

The case was submitted to the CO by NYDOL with the notation that advertisement of the position was not authorized because of a dispute regarding the prevailing wage. (AF 21). The CO then asked NYDOL to review its earlier prevailing wage determination based on the position being classified as a Supervisor/Knitting II, Code 685.130-010. The NYDOL's review resulted in a prevailing wage being established of $21.21 per hour. (AF 35).

On December 3, 1999, the CO issued a Notice of Findings (NOF) proposing to deny the application pursuant to §656.20 (c)(2) as the Employer's wage offer of $400.00 per week was below the prevailing wage of $21.21 per hour. (AF 36-38). The CO noted in this regard:

> Employer by two undated letters, received in the State Office on June 23 and August 12, 1997, submitted pages 3,4 and 24 of the 1996 Apparel Plant Wages

> Survey. The salary data on page 24 is Table 7 Average Weekly Earnings of Salary Employees; employer highlights Plant Office Manager. The occupations surveyed are not defined, the salary is just a number with no indication of what the number represents, the geographical area is not identified. Pages 3 and 4 are part of the Introductory Summary. It appears survey is national, plants may be grouped by product groups. There is no reference to Table 7. The statistical methodology used is not included. The material submitted is not acceptable countervailing evidence.

(AF 37). The Employer was advised that it could rebut this finding by increasing the salary offer to equal or exceed the prevailing rate of pay or by submitting a wage survey that meets the criteria in item J of the General Administration Letter (GAL) No. 2-98. (AF 36-37).

Employer filed its rebuttal on January 11, 2000. (AF 40-70). The rebuttal to the NOF included a letter from the Employer, 24 pages of the AAMA survey, and a copy of the OES Wage Data Page for the New York, NY area for OES Code 81008- First-Line Superv and Managers/Superv- Production And Operating Workers, which included the following job description:

> Directly supervise and coordinate activities of production and operating workers, such as testers, precision workers, machine setters and operators, assemblers, fabricators, or plant and system operators. Managers/Supervisors are generally found in smaller establishments where they perform both supervisory and management functions, such as accounting, marketing and personnel work, and may also engage in the same production work as the workers they supervise. Exclude work leaders who spend 20 percent or more of their time at tasks similar to those of employees under their supervision and repngage [sic] in the same production work as the workers they supervise. Exclude work leaders who spend 20 percent or more of their time at tasks similar to those of employees under their supervision and rep [sic]

(AF 40). The Employer contended that the wage survey it previously submitted meets the criteria of Part J of GAL No. 2-98 and the complete survey it was submitting defines the occupations surveyed, the mean salary, statistical methodology and geographical areas. It contended further that the survey relied on by the CO was overly broad and includes industries which are substantially different than the Employer's industry. (AF 69-70).

The NYDOL was asked by the CO to review the Employer's response, and it rejected the survey. (AF 100-102). The file was returned, and the CO issued a Final Determination ("FD") on May 6, 2000. (AF 103-04). The CO denied the application for certification on the basis that the Employer had neither increased its wage offer nor submitted a wage offer that meets the GAL 2-98 criteria. The CO based this conclusion on the following:

> In rebuttal, the employer submitted the entire 1966 Apparel Plant Wages Survey, asserting that it met the criteria in GAL No. 2-98 and is more accurate and realistic than the OES survey. The survey has been reviewed by the New York State prevailing Wage Specialist and is being rejected for the following reasons: it is not the most recent edition of the survey (which appears to be published annually) and the geographic area covers the Northeast Region consisting of eleven (11) states including New York State, which is larger than the New York, New York PMSA (New York City and Westchester, Rockland and Putman Counties) and thus unnecessarily expands the area of intended employment. The area of intended employment is defined as commuting distance; every area within a PMSA is deemed to be within commuting distance. In addition, while the survey included 10 supervisory job classifications including plant office manager, the survey job descriptions were not provided. He, thus, cannot determine if any of these job classifications in the survey match the employer's job.

(AF 105).

The Employer has requested a review of the denial of its application and the record has been submitted to the Board for this purpose.

Discussion

Section 656.20 (c)(2) provides that the ETA 750 must clearly show that the wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40. In turn § 656.40 provides that if the position is not covered by a prevailing wage determination under the Davis-Bacon and Service Contract Acts, the prevailing wage shall be determined by the average rate of wages, that is the rate of wages to be determined, to the extent feasible, by adding the wage paid workers similarly employed in the area of intended employment and dividing the total by the number of such workers. "Similarly employed" is defined in subsection (c) as "having substantially comparable jobs in the occupational category in the area of intended employment." "Area of intended employment" is defined in § 656.3 as the area within normal commuting distance of the place (address) of intended employment. If such address is within a Metropolitan Statistical Area (MSA) any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

Employer's counsel contends in its request for review that the CO's categorization of the job position is incorrect and has resulted in an invalid wage determination, whereas its wage survey conforms to the criteria in GAL 2-98 and is both accurate and relevant. Citing *Tuskegee University*, 1987-INA-561 (Feb. 23, 1988) (*en banc*)[1], Employer argues further that the CO failed to reasonably explain how the prevailing wage was determined, why it is appropriate under the

[1] *Tuskegee University* was overruled on other grounds by the Board in *Hathaway Children's Services*, 1991-INA-388 (Feb. 4, 1994) (*en banc*).

circumstances, and how it reflects conditions contemporaneous with the recruitment period.

We disagree. In the instant case, the CO clearly identified in the NOF, the survey on which she was relying in determining the prevailing wage. There is no record that the Employer ever requested a copy of this survey from the CO but apparently did obtain a copy on its own. Under such circumstances, it has no valid complaint. It has received due process. Further, we find that the CO's re-classification of the position is correct, and thus the survey submitted by Employer does not meet the criteria found in GAL 2-98.

Even if for no other reason, the Employer's proof fails because its survey does not show that it relates to the "area of intended employment" involved here. Rather, the closest it comes to identifying a specific area is the entire Northeastern portion of the United States. This is clearly not sufficient. The Employer had been adequately informed that it needed to narrow down the area of its study and has repeatedly failed to do so. This being the case, it is unnecessary to discuss other reasons why the Employer's survey fails.

In view of the forgoing, the CO's denial of certification in this case was appropriate.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400

Washington, DC 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.